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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, PETITIONER.

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 126–135) is reported at 311 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962 (R. 136). The petition for a writ of certiorari was filed on February 28, 1963, and was granted on April 22, 1963, limited to question 1 of the petition (R. 137; 372 U.S. 975). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 241(a)(4) of the Immigration and Nationality Act of 1952, directing that "Any alien in the

United States * * * shall * * * be deported who at any time after entry is convicted of two crimes involving moral turpitude," applies to an alien who was convicted of the crimes during a period when a fraudulently procured certificate of naturalization which was later cancelled remained outstanding.

STATUTE INVOLVED

Sections 241(a) and (b) and 340 (a) and (f) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1251 (a) and (b), 1451 (a) and (f), are set out in pertinent part in the Appendix (pp. 43–45, *infra*).

STATEMENT

Petitioner, born in Italy, entered the United States as an alien in 1895 and was naturalized in 1925 (R. 43). In 1954, he was convicted of having wilfully attempted to defeat and evade the payment of income taxes by filing false and fraudulent income tax returns for the years 1948 and 1949 (R. 48). The convictions were affirmed by this Court. *Costello* v. *United States*, 350 U.S. 359. In 1959, the order admitting petitioner to citizenship was revoked and set aside and his certificate of naturalization was cancelled on the ground that they had been procured by wilful misrepresentation (R. 13). The judgment ordering petitioner's denaturalization was likewise affirmed by this Court. *Costello* v. *United States*, 365 U.S. 265.

In 1961 the Immigration and Naturalization Service commenced proceedings to have petitioner ordered deported under § 241(a)(4) of the Immigration and Nationality Act, as an alien who "at any time after

entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," *i.e.*, income tax evasion for the years 1948 and 1949. The Special Inquiry Officer found petitioner deportable (R. 43–62); the Board of Immigration Appeals sustained the order (R. 65–90); and the court of appeals, upholding the order on the merits, dismissed the petition for review (R. 126–135). This Court granted certiorari limited to the single question whether a denaturalized alien may be deported under § 241(a)(4) on the basis of convictions that antedated his denaturalization (R. 137; 372 U.S. 975).

SUMMARY OF ARGUMENT

I

The question is whether an alien whose fraudulently procured naturalization was revoked after he had already been convicted of two crimes involving moral turpitude is deportable under § 241(a)(4) of the Immigration and Nationality Act, which provides that:

> Any alien in the United States * * * shall * * * be deported * * * who at any time after entry is convicted of two crimes involving moral turpitude, * * *

We contend as our first argument that the reference to "Any alien" requires only that the person sought to be deported be an "alien" and hence subject to deportation. Petitioner contends that the use of the present tense "is" in "Any alien * * * who * * * *is* convicted" requires that the deportee also have been

an alien at the time of the convictions. While petitioner's interpretation is, we believe, an unnatural reading of the words, the more conclusive answer is that it produces untenable results that Congress could not have intended.

A. The purpose of § 241(a)(4) was to require expulsion from the country of those aliens whose continued presence was, because of their demonstrated criminal propensities, considered to be undesirable. Whatever the alien's prior status, his conviction of two crimes demonstrates his criminal propensities, and hence undesirability, to the same degree. That an alien held a fraudulently procured certificate of naturalization at the time of conviction has, therefore, no logical relevance to the purpose to be served by § 241(a)(4).

B. The dependence of petitioner's interpretation upon the use of the present tense "is" in § 241(a)(4) means that most of the other provisions providing for deportation on the basis of past events, being phrased in the past tense, would remain applicable to pre-denaturalization conduct. No reason is apparent—and petitioner offers none—why Congress would have singled out § 241(a)(4) in that respect, and the indications are, to the contrary, that the variations in tenses reflect only differences in style and in the historical origins of the provisions. This Court, moreover, has held that "is" as used in § 241(a)(4) means "has been" for purposes of authorizing deportation based on convictions which antedated the Act. If the distinction was not considered significant

for that purpose—the purpose for which the tense used would seem primarily relevant—it cannot be for this purpose.

C. Under petitioner's reading, aliens who had been convicted of two crimes but had committed no fraud would be deportable while those who had committed two crimes plus a fraud (to obtain naturalization) would not be. Congress could not have intended to prefer persons guilty of fraud over those innocent of fraud.

D. If an alien's prior naturalized status was intended to be made a shield against deportation for things done while holding that status, deportability would logically have been made to turn upon status at the time of the commission of the acts, not at the time of conviction. Since § 241(a)(4), however read, speaks only of convictions, either petitioner's interpretation is unsound or Congress established an irrational standard.

E. In *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, this Court interpreted similar language ("aliens who * * * may hereafter be convicted") as not requiring alienage at the time of conviction. Not only was the statute not meaningfully distinguishable from § 241(a)(4), but the rationale of the Court's opinion—relying primarily upon the lack of any rational explanation, reasonably attributable to Congress, for the incongruous results produced by a contrary interpretation—is fully applicable to this case.

F. Petitioner's asserted inability, because of his outstanding naturalization at the time of the convic-

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tions, to have applied to the sentencing court under § 241(b) of the Act for a recommendation against deportation was, if it existed at all (which we deny), the result of his own fraud and provides no reason for disregarding the convictions.

II

Whatever doubts there may be about the independent applicability of § 241(a)(4) are removed by the interaction with that provision of the express direction in § 340(a) of the Act that a revocation of naturalization for fraud "shall be effective as of the original date of the * * * certificate" of naturalization. Given its natural meaning, that provision would make petitioner deportable under § 241(a)(4) regardless of whether "alienage" is required at the date of conviction. The history of the provision confirms that reading, for it shows that the prevention of a denaturalized alien's use of his cancelled certificate as a defense to deportation for prior convictions was, indeed, the most immediate and central purpose of the provision.

A. The enactment of the relation-back provision, new to the 1952 Act, seems plainly to have been prompted by this Court's decision in 1950 in the *Eichenlaub* case, *supra*. Prior to that decision, the lower courts had uniformly held that denaturalization for fraud was effective retroactively to the date of naturalization. In *Eichenlaub*, however, this Court, deciding the case on a different ground (see Point I, *supra*), treated the validity of the judicial relation-

back doctrine as being an open question. At the following session of Congress, there was added to the evolving bills leading to the 1952 Act, for the first time, the provision expressly directing that denaturalization "shall be effective as of" the date of naturalization. Since *Eichenlaub* involved a claimed application of the relation-back principle to establish, for deportation purposes, a denaturalized person's alienage at the time of a conviction—and had been decided by the Second Circuit on that ground—it seems evident that the express relation-back provision adopted in response to that decision was intended to apply for that purpose.

B. At the time the relation-back provision was added, there was already in the bill, and in the Act as passed (§ 340(f)), a section providing affirmatively for the consequences of denaturalization upon the derivative citizenship of the wife and children of a denaturalized alien. Since those consequences were no longer left dependent upon the implications of a relation-back principle, they cannot, as petitioner argues, be the explanation for the inclusion of the relation-back provision.

C. We do not contend that the relation-back provision, any more than any other statute, can be mechanically applied without regard to its purposes or the consequences produced. Surely its most basic purpose, however, was to assure that an alien who obtained his naturalization by fraud, and was later denaturalized, would not derive any special benefit or profit from his fradudulently-acquired status, for a

time, as a "citizen." And the minimum recognition that can be given to that purpose, we submit, is to hold that the provision forestalls the invocation of a fraudulently-acquired naturalization as a shield against deportation for acts for which the alien would otherwise be deportable and which, being crimes whatever the perpetrator's status, were not themselves influenced by the outstanding naturalization.

ARGUMENT

I

SECTION 241(a)(4), IN DIRECTING THE DEPORTATION OF ALIENS TWICE CONVICTED OF CRIMES INVOLVING MORAL TURPITUDE, DOES NOT EXEMPT CONVICTIONS ENTERED WHILE THE ALIEN HELD A FRAUDULENTLY-PROCURED CERTIFICATE OF NATURALIZATION.

Section 241(a)(4) of the Immigration and Nationality Act of 1952 provides that:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry * * *, or who at any time after entry is convicted of two crimes involving moral turpitude * * *.

With petitioner's naturalization having been revoked on the ground of fraud in its procurement, he is admittedly now an "alien in the United States" potentially subject to deportation. Having been convicted for income tax evasion for two years, he has also

admittedly [1] been convicted, after entry, of two crimes involving moral turpitude. In our view, and as the court of appeals held, those two elements suffice to establish petitioner's deportability under § 241(a)(4). That is to say, we interpret § 241(a)(4) to mean: "Any person who is subject to deportation as an alien shall be deported who at any time after entry is convicted of two crimes."

Petitioner contends, however, that § 241(a)(4) should be interpreted so as not to "count" for deportation purposes any conviction had while a certificate of naturalization, albeit fraudulently procured and later revoked, was outstanding. Textually, the argument is that the language, "Any alien * * * who * * * is convicted," requires that the person sought to be deported have been an "alien" on the date of the convictions as well as at the time of deportation, and that a person holding a naturalization certificate, even though fraudulently procured and later set aside, is not for that purpose an "alien." Petitioner would thus read § 241(a)(4) as though it said: "Any person who is subject to deportation as an alien shall be deported who, while an alien and at any time after entry, is convicted of two crimes."

While our reading of the statutory language is, we believe, much the more natural one, we do not contend that the question can be answered merely by a parsing of the words of the statute—or by bare asser-

[1] Though under compulsion of this Court's limitation of the grant of certiorari to exclude any question going to the nature of the convictions (R. 137).

tions that one reading or another is "self-evident" and the statute "permits" no other (Pet. Br. 7, 12). The process of interpretation does not stop with the words of the statute read in isolation. What is wrong with petitioner's interpretation is not so much that the words cannot be made to perform the service petitioner demands of them but that, as we will show, the result of so reading them cannot be rationalized with any purpose reasonably attributable to Congress. Indeed, his reading of the statute produces arbitrary discriminations and inconsistencies which Congress plainly could not have intended.

A. POSSESSION OF A CERTIFICATE OF NATURALIZATION ON THE DATE OF THE CONVICTIONS HAS NO LOGICAL RELEVANCE TO THE PURPOSE OF SECTION 241(a)(4) TO REMOVE FROM THE COUNTRY THOSE ALIENS WHOSE CONTINUED PRESENCE IS CONSIDERED TO BE UNDESIRABLE BECAUSE OF THEIR DEMONSTRATED CRIMINAL PROPENSITIES

The purpose of deportation is not to punish the alien for his prior acts—in which event status at the time of the acts might be relevant—but to remove from the country those who, as aliens, remain here at the pleasure of Congress and whose continued presence Congress, in the exercise of its acknowledged prerogatives in dealing with aliens, does not consider desirable. The tests of deportability prescribed in § 241 are thus but standards of the desirability of the alien's continued presence. In § 241(a)(4), then, the relevance of the fact of conviction for two crimes involving moral turpitude—and the only relevance of the fact—is that in the Congressional judgment multiple convictions demonstrate a criminal propensity making the alien undesirable. The purpose, as explained by

the sponsors of the predecessor to § 241(a)(4) in the Immigration Act of 1917 (§19, 39 Stat. 874) was to rid the country of any alien who, by being convicted a second time, "showed then a criminal heart and a criminal tendency" or demonstrated himself to be "a criminal of the confirmed type."[2]

If the function of the two-conviction standard is to establish the alien's confirmed criminal characteristics and hence undesirability—as the history shows it is—what bearing has the fact that the alien was a naturalized "citizen" at the time of the convictions? Do the convictions say less about the man because he also held, when convicted, a fraudulently-procured certificate of naturalization? The answer, obviously, is that the alien's criminal propensities and hence undesirability are equally demonstrated by his convictions whatever his nominal "citizenship" status at the time, and to make deportability turn upon the lost

[2] The bill that became the 1917 Act (H.R. 10384, 64th Cong., 2d Sess.) originally provided for deportation only for convictions for crimes committed within five years after entry. The extension to include multiple convictions whenever occurring was offered on the floor of the House by Congressman Sabath, who explained that the Congress should have no desire "to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted" (53 Cong. Rec. 5167). Congressman Burnett, who was in charge of the bill on the floor, explained the premise of the amendment as being "that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should be deported" (*id.* at 5168). The Senate committee report explained the provision as providing for the deportation of "a criminal of the confirmed type" (S. Rep. No. 352, 64th Cong., 1st Sess., p. 15).

status is to make it turn upon a circumstance having no logical relevance to the purpose to be served.

B. PRE-DENATURALIZATION CONDUCT WOULD, UNDER PETITIONER'S INTERPRETATION, BE BASIS FOR DEPORTATION UNDER SOME OF THE DEPORTATION PROVISIONS BUT NOT OTHERS, A DIFFERENCE FOR WHICH THERE IS NO JUSTIFYING RATIONALE.

Petitioner's argument, as he repeatedly proclaims, turns upon the use in § 241(a)(4) of the word "is" rather than "has been", "shall have been", or the like. As petitioner also notes (Br. 17–18), most of the other grounds for deportation based on past conduct are stated in the past tense. Petitioner uses that circumstance to assert that the use of "is" in § 241(a)(4) was a purposeful deviation designed to require that for purposes of § 241(a)(4), *unlike the other provisions*, the deportee have been an alien at the time of the act or event on which deportation is based. What it proves, we submit, is the opposite, for no shred of justification can be found or hypothesized for the resulting distinction between the grounds of deportation applicable to denaturalized aliens (*i.e.*, for pre-denaturalization conduct) and those which are not.

Under petitioner's interpretation, a denaturalized alien could, for example, admittedly be deported for the following conduct or events occurring while he was naturalized: engaging in certain subversive activities (§ 241(a), ¶ 7); being a drug addict (¶ 11); being convicted of a narcotics violation (¶ 11); being connected with the management of a house of prostitution (¶ 12); being convicted of carrying a sawed-off shotgun (¶ 14); being convicted of violating the provisions of the Alien Registration Act (¶¶ 15, 16); being

convicted of violating various wartime statutes (¶ 17); or being convicted of importing an alien for immoral purposes (¶ 18). Yet because of a shift of tense in the wording of the ground for deportation, petitioner contends that he cannot be deported, under the fourth paragraph of the same subsection, for his conviction for two crimes involving moral turpitude. Why Congress did, or conceivably might, single out that one ground for deportation and make it, unlike all the rest, inapplicable to pre-denaturalization conduct, petitioner does not even attempt to explain.

The fact, of course, is that there is no possible reason for a difference among the grounds for deportation in their application to pre-denaturalization conduct. Even less is there any indication in the legislative history that a difference was intended. Petitioner's reading of § 241(a)(4) thus introduces a wholly fortuitous and arbitrary distinction in the grounds of deportation applicable to denaturalized aliens.

What a comparison of § 241(a)(4) with its neighbors really shows, we submit, is that the variations of wording in referring to past conduct reflect only a difference of style—attributable in part, no doubt, to the different antecedents of the several provisions.[3]

[3] The Immigration and Nationality Act of 1952 stemmed from a two and one-half year study of the entire immigration system conducted by the Senate Committee on the Judiciary. As a result of this study, the Committee developed one complete "omnibus" bill which embodied the "patchwork" of prior immigration and naturalization laws. See S. Rep. No. 1515, 81st Cong., 2d Sess., at 1–4. In preparing the bill, the committee made a special point, according to its chairman, Senator McCarran, not to make changes in existing law "for the sake of

That Congress attached no significance to the tenses is also confirmed by the 1950 report by the Senate Committee on the Judiciary on its study of the immigration and nationality laws, where in describing the provision of existing law for the deportation of multiple offenders and recommending its retention the Committee repeatedly used the past tense, notwithstanding that both the existing law and the bill simultaneously introduced by its chairman, like the Act as passed, used the present-tense "is."[4] If that word

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change", "especially since throughout the years there has been built up a body of judicial and administrative interpretations" that should not be disturbed. Joint Hearings before the Subcommittee of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., p. 3; 82 Cong. Rec. 5089.

The result of that approach to the writing of the Act is perhaps particularly apparent in § 241(a), which—as a reading of it will readily reveal—represents a collection of numerous provisions for deportation which had been enacted by various Congresses over the period from 1917 through 1940. Section 241(a)(4) derives from § 19 of the Immigration Act of 1917, 39 Stat. 874, and, although fairly completely rewritten, its use of "is" may be attributable to the fact that the 1917 Act used the phrase, "is hereafter sentenced." The "shall have been convicted" phrasing of § 241(a)(14), (15), and (16) is much more easily traced, coming directly from § 20(b) of the Alien Registration Act of 1940, 54 Stat. 672. As another example, the "has been or may hereafter be convicted" language of § 241(a)(17) is a clear carryover from the Act of May 10, 1920, § 1, 41 Stat. 593.

[4] The existing law, § 19 of the Immigration Act of 1917, 39 Stat. 874, referred to any alien "who is hereafter sentenced * * * more than once * * * at any time after entry." The bill developed by the committee and introduced by its chairman on the same day the committee's report was filed, used language identical to § 241(a)(4) as enacted (S. 3455, 81st Cong., 2d Sess).

had the crucial significance petitioner claims for it, Congress was unaware of it.

A further answer to petitioner's insistence that "is" in § 241(a)(4) does not encompass "has been" is that this Court has held precisely to the contrary on the question for which the tense used would seem clearly to have its primary, if not only, significance—namely, whether the provision, stated in the present tense, applies to convictions occurring prior to its enactment. *Lehmann* v. *Carson*, 353 U.S. 685. If "is" was used in a comprehensive sense including "has been" for the purpose for which the tense is primarily important—to describe the *time* of the convictions—it seems hardly possible to infer from the use of "is" in contrast to "has been" a purpose by Congress to make a radical distinction between that provision and its companions on a matter—the necessity of alienage at the time of the event—on which tense would seem at best to have only an indirect bearing. It is, after all, the very same word in the very same statute that is being construed, and if this Court has said that "is" means "has been" for one purpose (time of the conviction), the structure petitioner has built, for another purpose (alienage at the time of the conviction), upon the as-

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Yet the report, after several times using the past tense in summarizing the existing law, concludes with the recommendation that "the deportation provisions with respect to *aliens who have been convicted* of a crime involving moral turpitude should be retained in the law with some modification" (S. Rep. 1515, 81st Cong., 2d Sess., p. 391, emphasis added), a recommendation that was presumably thought to have been carried out by the "alien * * * who * * * is convicted" language of the committee's bill.

sertion that "is" cannot mean "has been" must indeed rest upon a weak foundation.[5]

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[5] Petitioner relies, in support of the implications he finds in the use of "is", on *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C.A. 9), certiorari denied, 346 U.S. 876. Mangaoang was a Filipino and, as such, a "national" of the United States until 1946 when, with the advent of Philippine Independence, he automatically became an alien. He was a member of the Communist Party during 1938–1939. Because of that membership, he was sought to be deported, after he had become an alien, under a provision of the Internal Security Act of 1950 (§ 22, 64 Stat. 1006, cf. § 241(a)(6)(C) of the Immigration and Nationality Act of 1952) providing in relevant part for the deportation of:

"Aliens who, at any time, * * * shall have been members of any of the following classes: * * * (C) Aliens who are members of * * * the Communist Party * * *."

The court interpreted that statute as requiring that the deportee be an alien and a Party member at the same time and held that Mangaoang, since he was a Party member only in 1938–1939 and not an alien until 1946, was not deportable. Whatever the merits of that decision, the statute poses a problem of interpretation very different from that involved here. The difficulty lies in the effect to be given to the double reference—in effect, "aliens who shall have been aliens who are". Mangaoang may have been an "alien who was a member" but it can be argued that he was not an "alien who was an alien who was a member." At least one way to give meaning to the double reference is to read the first clause as requiring the second clause to be applied from a contemporaneous point of view—i.e., by reading the first clause as making a reference back to a concrete time. Thus, substituting in Mangaoang's case "1938–1939" in the place of "at any time", the first clause would read: "Aliens who, at any time (that is, in 1938–1939), * * * shall have been members of any of the following classes: * * *" In turn, it is plain that *in 1938–1939* Mangaoang was in fact not a member of class (C), "Aliens who are [Party] members", since he was not then an alien. But however that labyrinth is to be resolved, it is plain than it turns on problems unique to that statute and is of no help to petitioner here.

C. PETITIONER'S ARGUMENT WOULD CREATE AN IRRATIONAL PREFERENCE IN FAVOR OF ALIENS WHO PROCURE NATURALIZATION CERTIFICATES BY FRAUD.

Were there no other objection to petitioner's reading, it would be a sufficient cause to reject it that it gives a preference to persons guilty of fraud. Had petitioner not been naturalized, he would admittedly be deportable for his conviction of two crimes involving moral turpitude. He claims immunity from deportation solely because he fraudulently procured and held for a time a certificate of naturalization. He contends, in short, that Congress intended to prefer aliens who by fraud obtain naturalization certificates over those innocent of fraud. Since, if anything, two convictions plus one fraud demonstrate an alien's undesirability even more conclusively than do two convictions alone, there is no possible reason, we submit, why Congress would have intended to accord denaturalized aliens such an irrational preference.

D. PETITIONER'S INTERPRETATION IRRATIONALLY MAKES DEPORTABILITY TURN UPON THE ALIEN'S PRIOR STATUS AT THE TIME OF THE CONVICTIONS RATHER THAN AT THE TIME OF THE COMMISSION OF THE ACTS.

Under petitioner's interpretation of § 241(a)(4) as being dependent upon the prior status of the alien, the prior status that is made determinative is his status at the time of the convictions, not at the time of the commission of the crimes. We submit that if Congress had intended a certificate of naturalization, even though fraudulently obtained, to serve as a shield to deportation for events taking place while it was outstanding, it would have made the date of the commis-

sion of the acts, not the date of the conviction, controlling. The only rationale for making prior status relevant would be that Congress wished, despite the fraud in procurement, to give full effect to the denaturalized alien's status, for a time, as a "citizen" and to that end immunize him from deportation consequences for anything he might have done while acting under the "protection" of that status. That rationale, however, would obviously require that status on the date of commission of the acts be determinative. Making status on the date of conviction controlling—so that, for example, a naturalized citizen who commits two crimes, is denaturalized, and is then convicted may be deported notwithstanding his prior status*—would be wholly irrational. That petitioner's interpretation necessarily produces that irrational consequence confirms that it could not have been intended.

B. THE DECISION OF THIS COURT IN EICHENLAUB V. SHAUGHNESSY, CONSTRUING SUBSTANTIALLY IDENTICAL LANGUAGE IN A PRIOR ACT, CONTROLS THIS CASE.

Neither the issues presented by petitioner nor his arguments are new. They have been authoritatively answered by this Court in *Eichenlaub* v. *Shaughnessy* (together with *Willumeit* v. *Shaughnessy*), 338 U.S. 521.

* If, indeed, the original proceedings to denaturalize the petioner brought in 1952 had been successful (see *United States* v. *Costello*, 145 F. Supp. 892, reversed, 247 F. 2d 384 (C.A. 2), reversed, 356 U.S. 256) that is precisely the posture petitioner would now be in. It is only the fortuitous circumstance that the convictions were, as it happened, obtained before the denaturalization that makes petitioner's present argument possible.

Eichenlaub and Willumeit were naturalized in the 1930's; they were convicted in 1941 and 1942 of violations of the Espionage Act; and their naturalization certificates were cancelled for fraud in 1944. The question was whether they were deportable under the Act of May 10, 1920, 41 Stat. 593, which, speaking as of its enactment in 1920, provided for the deportation of:

> *All aliens who* since August 1, 1914, have been or *may hereafter be convicted* of any violation [of the Espionage Act, among others] * * *.

Seizing upon the language italicized above—the applicable language since the convictions occurred after the 1920 Act[3]—the petitioners made exactly the same argument that is made here.[4] Rejecting the argument, this Court held that all that the use of the word "aliens" in the introductory phrase required was that

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[3] If petitioner means to imply (see Pet. Br. 12–13) that the *Eichenlaub* decision turned upon the branch of the statute phrased in the past tense ("aliens who since August 1, 1914 *have been* * * * convicted"), he is plainly in error. That phrase applied only to those convicted between August 1, 1914, and the date of enactment of the Act, May 10, 1920. Eichenlaub and Willumeit were convicted, respectively, in 1941 and 1942.

[4] *E.g.*, Brief for the Petitioner, *Willumeit* v. *Shaughnessy*, No. 82, Oct. Term, 1949, p. 7: "The language shows that the alien must be an 'alien' at the time that he 'may * * * be convicted.' The use of the words 'aliens who may *be*' convicted indicates that the alien must '*be*' an alien at the time of conviction. There is no other grammatical possibility." The government's brief replied to the argument at length. Brief for the Respondent, pp. 6–10.

"all persons to be deported * * * shall be 'aliens'" (p. 528), not that (p. 530):

> * * * the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. * * *

The significance of the *Eichenlaub* decision to this case derives not only from the substantial identity of the language involved—there, "All aliens who * * * may hereafter be convicted"; here, "Any alien * * * who * * * is convicted"—but also from the direct applicability to this case of the Court's reasoning. In an opinion largely paralleling the points we have made above, the Court said:

> The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status

would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute. [pp. 530–531]

* * * * * *

* * * If the Act of 1920 had been intended to initiate the distinction here urged by the relators, it is likely that the change would have been made by express provision for it. We find nothing in its legislative history that suggests a congressional intent to distinguish between two such groups of undesirable criminals. [p. 532]

* * * It is hardly conceivable that, under those circumstances [*]; Congress, without expressly saying so, intended to prevent * * * [the deportation of] alien offenders merely because they had received their respective convictions at times when they held certificates of naturalization, later canceled for fraud. To do so would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it. * * * [p. 532]

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[*] *I.e.*, in the light of legislative history showing that the Act, although framed in general language, was particularly occasioned by a purpose to deport, among others, a specific group of aliens then interned as dangerous enemy aliens and others who had already been convicted. See 338 U.S. at 532. To that extent, there is a difference between the legislative history of that provision and the one involved here. However, the history showing that the purpose of § 241(a)(4) was to rid the country of aliens who, because of their confirmed criminal propensities, were deemed undesirable (see pp. 10–12, *supra*) supplies an equivalent element here.

Those arguments are as sound today as they were then, and, as we have shown, they apply with equal force to § 241(a)(4) of the 1952 Act.

F. SECTION 241(b) PROVIDES NO REASON WHY PETITIONER'S CONVICTIONS SHOULD NOT BE MADE A BASIS FOR HIS DEPORTATION

Apart from his reliance on the tense used in § 241(a)(4), the sole argument made by petitioner is one based on the asserted implications of § 241(b) of the Act. That provision, derived from § 19 of the 1917 Act,[10] provides in part that:

> The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported * * *.

Petitioner argues that, because he held a naturalization certificate at the time of his convictions, he was barred from invoking the sentencing court's equitable powers to grant him immunity from deportation under that provision; and that, because he was barred from seeking an immunizing recommendation, his convictions should not be counted for purposes of § 241(a)(4).

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[10] Immigration Act of 1917, 39 Stat. 874. The origin of the provision in the 1917 Act makes frivolous petitioner's otherwise insubstantial suggestion that § 241(b) might in some way have been in "answer" to "the problem posed by the *Eichenlaub* dissent" (Br. 24, n. 18).

The argument is insubstantial. Even assuming that the outstanding naturalization certificate prevented petitioner from seeking a recommendation, his disability was, after all, the product of his own fraud. It can hardly be inferred that Congress intended to give to those precluded by their own fraud from *asking* for a recommendation the full benefit (by automatically discounting their convictions) of a *grant* of a recommendation, putting only on non-fraudulent aliens the burden of showing cause for leniency. The privilege accorded is essentially an appeal to the equitable discretion of the court, and if the "clean hands" doctrine and the principle that "he who seeks equity must do equity" are not literally applicable, they at least suggest a norm that should quickly dispose of the extraordinary interpretation petitioner urges.

Nor is petitioner helped by the decision in *Gubbels* v. *Hoy*, 261 F. 2d 952 (C.A. 9), whatever its own merits. The decision there was, analytically, an interpretation of the word "convicted" as used in § 241 (a)(4) and was cast in terms of the nature of the tribunal rendering the judgment, the court holding that the judgments of military courts-martial were not "convictions" within the meaning of § 241(a)(4). It may be granted that the main, if not the only, justification given by the court for its interpretation was that court-martial proceedings were not adapted to exercising the power given by § 241(b), but in no sense did the court announce a rule at large that in any case in which the defendant was precluded, for whatever reason, from requesting a § 241

(b) recommendation the conviction was not to count for deportation purposes. We do not deny that the general non-availability of § 241(b) in a class of proceedings might be relevant—as one of many relevant circumstances—as an aid to the interpretation of some other provision, but it cannot itself be the source of a general "rule" of the sort for which petitioner contends."[11] We point out, finally, that in *Gubbels* the court's concern was with the inability of servicemen as a class, and through no fault of their own, to obtain such recommendations, and the resulting discrimination between them and civilians. Here, petitioner's alleged disability results from his own fraud, and the only discrimination involved is that which would result under petitioner's interpretation in favor of fraudulent aliens over non-fraudulent aliens.

In all events, it is not true, we submit, that petitioner was barred from requesting a § 241(b) recommendation. Granted that the provision applies in terms only to "aliens," a person holding a fraudulently-obtained certificate of naturalization would be an "alien" for this purpose (see Point II, *infra*), and one whose status was doubtful could quite properly request the court to make a conditional or "protective" recommendation without in any way abandon-

[11] See *Circella* v. *Neelly*, 115 F. Supp. 613 (N.D. Ill.), affirmed, 216 F. 2d 33 (C.A. 7), certiorari denied, 348 U.S. 817, rejecting an argument that an alien could not be deported on the basis of a pre-1917 conviction because the immunizing-recommendation power, first provided for in the 1917 Act, was not available at the time of his conviction.

ing his claim that his naturalization was valid. And particularly is that true in petitioner's case, for proceedings (ultimately abortive [12]) for his denaturalization were in fact pending at the time of his convictions in 1954.

II

SECTION 340(a), WHICH PROVIDES THAT AN ORDER CANCELLING A CERTIFICATE OF NATURALIZATION FOR FRAUD "SHALL BE EFFECTIVE AS OF" THE DATE THE CERTIFICATE WAS ISSUED, PRECLUDES THE INVOCATION OF PETITIONER'S CANCELLED "CITIZENSHIP" AS A DEFENSE TO HIS DEPORTATION BASED ON HIS CONVICTION, WHILE HOLDING THE FRAUDULENTLY-PROCURED NATURALIZATION CERTIFICATE, OF TWO CRIMES INVOLVING MORAL TURPITUDE.

We have shown in Point I that, even standing alone, § 241(a)(4) does not exempt from deportation aliens who, when convicted of their crimes, happened to hold fraudulently-procured certificates of naturalization that had not yet been revoked. We will show in this Point that whatever doubts may exist about the effect of § 241(a)(4) standing alone are put to rest by the interaction with that provision of the direction in § 340 (a) of the Act that a denaturalization for fraud "shall be effective as of the original date" of the naturalization.

Section 340(a) of the Act authorizes proceedings to be brought against a naturalized citizen:

> * * * for the purpose of revoking and setting aside the order admitting such person to citizen-

[12] See note 6, *supra*.

> ship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and *such revocation* and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization *shall be effective as of the original date of the order and certificate,* respectively * * *. [Emphasis added.]

It was under that provision that petitioner was denaturalized and the cancellation of his naturalization certificate was accordingly "effective as of" 1925, the date of his naturalization. By the literal terms of the statute, therefore, petitioner must now be deemed to have always been an "alien", including, of course, at the time of his convictions in 1954. It follows, if the words of the statute are to be given their natural meaning, that petitioner is deportable under § 241(a)(4) regardless of whether that provision requires alienage at the time of the convictions.

Despite the unlimited wording of the "relation-back" provision, however, petitioner contends that its only purpose was to cause a naturalized citizen's wife and children, upon his denaturalization, also to lose their derivative citizenship, and that it should accordingly not be applied for deportation purposes—*i.e.*, to deprive him of his asserted defense against deportation as a multiple offender that he was a "citizen" when convicted of his crimes. The basis for petitioner's inference as to the limited purpose of § 340(a) is his assertion that at the time of its enactment, as a codifica-

tion of existing law, the only cases applying the relation-back doctrine had done so in the derivative-citizenship context.

The short answer to petitioner's argument is that, even if his premise were correct (that the pre-statutory cases had applied the relation-back principle only in derivative-citizenship cases), the fact would remain that it was the principle, not the particular application, that was written into the statute. Petitioner's argument is, however, even more fundamentally fallacious, for, as we will show (A) not only had the lower courts applied the principle also for deportation purposes but it was a doubt about the principle raised by this Court *in a deportation case* that prompted its statutory ratification; (B) its effect upon derivative citizenship cannot explain the provision for the simple reason that it has no effect upon derivative citizenship; and (C) whatever limits there may be to the implications of the relation-back provision, its application here to prevent petitioner from profiting from his own fraud is the minimum effect that can be given to its underlying purpose.

A. THE HISTORY OF THE RELATION-BACK PROVISION SHOWS THAT IT WAS INTENDED TO APPLY TO DEPORTATION.

1. *Judicial background.*—Although revocation of naturalization certificates fraudulently obtained has been expressly authorized by statute since 1906,[13] no provision expressly governing its retroactive effect

[13] Act of June 29, 1906, § 15, 34 Stat. 601; Nationality Act of 1940, § 338(a), 54 Stat. 1158.

was enacted until the 1952 Act. In the interim came the judicial evolution of the relation-back doctrine.

The generally-accredited birthplace of the doctrine is *Johannessen* v. *United States*, 225 U.S. 227, 240–241, where the Court—although actually holding only that the provision of the 1906 Act authorizing cancellation of fraudulently-procured naturalization could constitutionally be applied to revoke previously-granted certificates—quoted with approval the comment of a lower court that one obtaining a grant of citizenship by fraud "takes nothing by his paper grant." Language implying that citizenship fraudulently obtained is a nullity appears also in *Luria* v. *United States*, 231 U.S. 9, 24.

The first real application of the principle that denaturalization for fraud is effective *ab initio* was, however, the 1932 decision of the Third Circuit in *Rosenberg* v. *United States*, 60 F. 2d 475, certiorari denied, 287 U.S. 645, holding that the revocation for fraud of a naturalization certificate also terminates any rights of citizenship derived from it (there, by a wife). But while the application was to derivative citizenship, the principle invoked was of much broader import: the reason the wife was no longer a citizen was that "she never could have been an American citizen, because she was not the wife of a naturalized man"; and the reason her husband was not "a naturalized man" was that "the certificate of naturalization was simply a paper fraud and conferred at the time of its grant no rights whatever" (60 F. 2d at

476).[14] In *Battaglino* v. *Marshall*, 172 F. 2d 979, certiorari denied, 338 U.S. 829, the Second Circuit similarly held—and for similarly broad reasons (see 172 F. 2d 981)—that denaturalization for fraud resulted also in the loss of derivative rights.

But while petitioner is correct that the *Rosenberg* and *Battaglino* cases, despite the generality of the principles invoked, actually involved applications of the relation-back principle only for derivative-citizenship purposes (Br. 26), he is in error if he means to imply that the pre-statutory developments ended there. Almost a year before the Second Circuit decided the *Battaglino* case (March 3, 1949), it had decided the *Eichenlaub* case (May 3, 1948)[15] and it had reaffirmed that decision in the *Willumeit* case (January 3, 1949)[16] still some months before the *Battaglino* decision. As our earlier discussion of the Supreme Court's decision in *Eichenlaub* and *Willumeit* indicates (pp. 18–22, *supra*), the question involved was substantially identical to that involved here—whether a denaturalized alien could be deported for a conviction while he was a naturalized "citizen." The Sec-

[14] See also *In re Findan*, 4 F. Supp. 189, 190 (D. R.I.), decided a year after *Rosenberg*, in which the court, although holding that derivative rights did not fall in the absence of actual fraud, stated that if actual fraud were present "the proceeding might then be regarded as a nullity from the beginning and the conclusion reached that no one could derive rights as a result of such fraudulent acts."

[15] *Eichenlaub* v. *Watkins*, 167 F. 2d 659, affirmed *sub nom. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521.

[16] *Willumeit* v. *Watkins*, 171 F. 2d 773, affirmed *sub nom. Willumeit* v. *Shaughnessy*, 338 U.S. 521.

ond Circuit, unlike the Supreme Court, decided the cases expressly on the basis of the relation-back doctrine, holding that even if alienage at the time of conviction was necessary "the decree of denaturalization relates back, at least for this purpose." ([redacted], 167 F. 2d at 660.)

Although Congress had given some recognition to the relation-back doctrine, at least by negative implication, by including in the Nationality Act of 1940 a provision *saving* derivative rights from loss upon denaturalization in certain circumstances (§ 338(d), 54 Stat. 1159), the relation-back doctrine had up to this point been a product solely of judicial development. The stage was set, however, for the legislative developments leading to the inclusion of an express relation-back provision in the Immigration and Nationality Act of 1952.

2. *Legislative development.*—Arranged in an order that allows for the inevitable time lag between judicial stimulus and legislative response, the crucial events leading to the adoption of § 340(a)'s relation-back provision were these:

(a) On April 20, 1950, having completed a two-and-a-half year comprehensive study of the immigration and nationality laws,[17] the Senate Committee on the Judiciary, under the chairmanship of Senator McCarran, published a massive, 925-page, report on the results of its study. S. Rep. 1515, 81st Cong., 2d Sess. The report stated as the committee's understanding

[17] The study had been authorized on July 26, 1947, by Senate Resolution 137, 80th Cong., 1st Sess.

of existing law that an order of denaturalization left the alien in the status of never having been a citizen and that any relief from that effect required a specific statutory reservation (like the derivative-rights "savings" provisions of the 1940 Act, *supra*) (*id.* at p. 755):

> The effect of a decree of denaturalization, as distinguished from expatriation or forfeiture of citizenship, is to declare that the "naturalized" person never was in fact naturalized, because either by fraud or illegality the statutory prerequisites were not met. The naturalization laws make certain reservations, saving the naturalization of children who derive citizenship from a parent from the alienage which they would otherwise incur because of the fraudulent or illegal naturalization.

Since they were the cases most directly supporting it, the committee's statement presumably was based on the authority of the long-standing decision of the Third Circuit in *Rosenberg* (1932) and the more recent decisions of the Second Circuit: *Eichenlaub*, decided more than two years before the report, and *Willumeit* and *Battaglino*, decided almost a year before. The report does not reflect the doubts about the doctrine raised by the Supreme Court's decision in *Eichenlaub* and *Willumeit*, but since that decision had been announced (on January 16, 1950) a bare three months before its publication, it is hardly likely—in view of the time required for the preparation of such a massive and comprehensive report—that it could have.

(b) Also on April 20, 1950, Senator McCarran introduced an "omnibus" bill that had been developed by the study committee to replace the existing "patchwork" of immigration and nationality statute laws, S. 3455, 81st Cong., 2d Sess. See 96 Cong. Rec. 5412, 5451–5452; S. Rep. 1515, *supra*, pp. 1–4. That bill—evidently reflecting the committee's satisfaction with the existing judicial gloss on the retroactive effect of denaturalization as stated in its report—contained no express relation-back provision. The bill did, however, contain a provision providing affirmatively for the consequences of denaturalization upon derivative rights (§ 339(f), identical to § 340(f) of the 1952 Act), so that at least those consequences were no longer left dependent upon the implications of the relation-back doctrine (as they were under the purely negative "saving" provisions of the prior law).

(c) On January 16, 1950—chronologically before the above events but too late to have influenced them—the Supreme Court announced its decision in the *Eichenlaub* and *Willumeit* cases, 338 U.S. 521. In that decision, the Court, although affirming the Second Circuit's decisions, did not, as the Second Circuit had, rely on the relation-back principle, but rather held, as we noted in Point I (pp. 18–22, *supra*), that the deportation statute there involved did not require alienage at the time of the convictions. What the Court did say about the relation-back question, however, has major significance here. The Court's comments on the

question, in full, were as follows (338 U.S. at 529–530):

> The one substantial issue is whether the Act requires that the relators not only must have been "aliens" at the times when they were ordered deported, but that they must also have had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were "aliens" when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators' naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg* v. *United States*, 60 F. 2d 475 (C.A. 3d Cir.). They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly, they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an *alien status when convicted* of the designated offenses.
>
> In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denaturalization orders. A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. * * *

Two things are significant about those comments. First, as the Court phrased the issue, the question

went to the general validity of the relation-back principle, not to whether the principle, if generally valid, was applicable for deportation purposes. Second, by expressly framing the question and then refusing to decide it, the Court implied that the principle that denaturalization took effect *"ab initio"* or had "a retroactive effect," which the committee's study report had taken as settled, was not settled at all.

(d) At the next session of Congress, Senator McCarran introduced a new bill (S. 2055, 82d Cong., 1st Sess.) the provisions of which had been "further refined" as a result of the committee's continuing study.[18] That bill was introduced on August 27, 1951, over a year and a half after the Supreme Court's *Eichenlaub* and *Willumeit* decisions. Although it was otherwise identical to the prior bill in all respects material here, the new bill included for the first time the provision ultimately adopted[19] in § 340(a) expressly directing that a revocation of naturalization "shall be effective as of the original date of the order and certificate."

3. *Implications of the legislative developments.*— The implications of the legislative development of

[18] See Joint Hearings before the Subcommittee of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., pp. 2–3, which, although not touching explicitly on the point involved here, explains generally the evolution of the bills leading to the Act.

[19] The provisions of S. 2055, with further slight revisions, were lated incorporated into companion bills, S. 2550 and H.R. 5678, 82d Cong., 2d Sess., and the House bill was then enacted into law.

§ 340(a) are self-evident. In the first place, it is not true (cf. Pet. Br. 26) that there were no prior cases applying the judicial relation-back doctrine for deportation purposes. The Second Circuit decisions in *Eichenlaub* and *Willumeit* applied it in precisely the context involved here, and they were two of the only four cases (actually antedating the fourth, *Battaglino*, upon which petitioner relies, Br. 26) that can be said to have supported the committee's statement of the prior law. Even more important, however, the chronology of the belated addition of the provision to the evolving bills suggests irresistibly that its addition was specifically prompted by the doubts newly raised about the doctrine by this Court's opinion in *Eichenlaub* and *Willumeit*. As petitioner says (Br. 24, n. 18), "Congress was aware of what was said [by the Supreme Court] in *Eichenlaub* when it enacted the 1952 Act." Since the Court's opinion did in fact give good cause to regard the question, despite the uniform lower court decisions, as remaining "unsettled", it gave every reason to Congress, engaged in a comprehensive restatement of the law of immigration and nationality, expressly to resolve the matter. It did so in § 340(a) of the Act.

If, in turn, this Court's *Eichenlaub-Willumeit* opinion was the occasion for adding the provision, no doubt can be harbored that the provision was intended to have the consequence, at a minimum, of precluding a denaturalized alien sought to be deported because of his criminal convictions from invoking his cancelled naturalization as a defense on

the ground that he was not an "alien" at the time of the convictions. For it was precisely that use of the cancelled certificate that was sought to be made in *Eichenlaub-Willumeit* and which this Court chose not to decide. At least from the face of the opinion, moreover—and for present purposes it is what was said, not its merit, that is controlling—the Court chose to rely on another ground not because of any doubts about whether the principle would *apply* in that context but because it preferred not to have to decide the validity of the *principle* itself. The Court's opinion thus posed the question for Congress specifically in this context and on the apparent assumption that the answer to it would be dispositive of that case (and hence this case). With the question thus framed, Congress answered it in no less definitive terms. The dialogue between Court and Congress was direct and sharply defined, and, if by the enactment of the relation-back provision of § 340 (a) Congress did not succeed in preventing the use petitioner seeks to make of his cancelled naturalization, it cannot be on the ground that that was not the Congressional will.

B. THE RELATION-BACK PROVISION HAS NO CONSEQUENCE FOR DERIVATIVE-CITIZENSHIP PURPOSES, MAKING LESS THAN ADEQUATE PETITIONER'S EXPLANATION THAT THAT WAS ITS SOLE INTENDED CONSEQUENCE.

Not only is petitioner demonstrably wrong in his assertion that the relation-back provision was not intended to apply for deportation purposes, but his explanation of the provision as serving only to assure

the derivative loss of derivative rights is in fact no explanation at all. At the time the relation-back provision was added, as we have noted, there was already in the bill (and in § 340(f) of the Act as passed [20]) a separate provision affirmatively prescribing, without reliance upon the implications of a general relation-back principle, the consequences of denaturalization upon derivative citizenship (see S. 3455, *supra*, § 339(f)). The effect of denaturalization upon derivative citizenship was thus the one consequence for which there was no longer any need to invoke—or legislate—a relation-back principle. If, therefore, the relation-back provision of Section 340(a) had any purpose at all—as we must assume it did—it must have been meant to have an impact on matters other than derivative citizenship. And what that impact might be, unless it be upon status for deportation purposes, petitioner does not suggest.

C. WHATEVER LIMITS THERE MAY BE ON THE IMPLICATIONS OF THE RELATION-BACK PROVISION, ITS APPLICATION HERE IS THE MINIMUM CONTENT THAT CAN BE GIVEN TO IT.

The basic purpose of the relation-back provision was to assure that a denaturalized alien would not continue to benefit from his fraudulently-procured citizenship. While the extent to which it might operate to make a denaturalized alien worse off than if he had never been naturalized may be doubted, it

[20] Section 340(e) of the Act, which is in the form of the old "savings" provision of the 1940 Act, applies only to denaturalization under the prior acts, not to those under Section 340(a), where the relation-back provision appeared for the first time.

was surely intended to prevent his being better off. And the very minimum application of that principle, we submit, is to forestall the invocation of fraudulently-acquired naturalization as a shield against deportation for acts for which the alien would otherwise have been deportable and which were not themselves influenced by the outstanding naturalization.

We do not argue, we wish to emphasize, that an alien whose naturalization has been revoked under § 340(a) is in exactly the same position, for all purposes, as one who had never been naturalized. The relation-back provision obviously cannot be so mechanically applied, without regard to its purposes or the consequences produced. It would be plainly absurd, for example, to charge a person who traveled on an American passport while he held a certificate of naturalization with having reentered the country without the proper documents (*i.e.*, an entry visa as an alien) because his naturalization was later revoked. See *Matter of C* ———, 3 I. & N. Dec. 275, quoted at Pet. Br. 34–35, a pre-1952 Act decision rejecting such an application of the judicial relation-back doctrine.

A closer question is whether a person who travels abroad and returns while holding a naturalization certificate should, because of his later denaturalization, be deemed to have made an "entry" at that time (for purposes, *e.g.*, of establishing deportability on the basis of a conviction for a single crime com-

mitted within five years of "entry," Section 241(a)(4), or on the basis of pre-"entry" conduct). "Entry" is defined as the coming into the country of an "alien" (Section 101(a)(13)) and, because of the many grounds for deportation turning upon the time of entry, is an act fraught with serious consequences for an alien, placing in jeopardy whatever status he may have acquired by his prior residence here. At the same time, a sojourn abroad is an act having no consequence for a citizen. Accordingly, the status of the person at the time of the action, as alien or citizen, has a direct and important bearing on whether the action is taken. That being so, there is plainly an element of unfairness in holding that a person who travelled abroad in reliance upon an outstanding naturalization certificate—an act thought to be without consequence—in fact made a new "entry" which placed in greater jeopardy his right to remain in the country. Since an alien not holding a naturalization certificate might well have refrained from leaving the country rather than risk the consequences of a new entry, such an application of the relation-back principle would not merely prevent the alien from benefiting from his fraud; it would, in a sense, make him *worse* off than he would have been had he never been naturalized. For those reasons, the decision in *Brancato* v. *Lehmann*, 239 F. 2d 663 (C.A. 6), upon which petitioner so heavily relies (Br. 26–27)—holding that a coming into the country by a naturalized

citizen is not made an "entry" by his later denaturalization—seems to us an entirely reasonable one."[21]

But from the fact that the relation-back provision cannot be mechanically applied to every situation and for every purpose it does not follow, as petitioner seems to suggest, that it should be given no effect at all. The solution must rather be to seek out its basic purpose and confine its application to those circumstances in which that purpose would be effectuated. The basic object of the provision, it seems evident, was to assure that an alien who was found to have obtained his naturalization by fraud, and was accordingly denaturalized, would not derive any special benefit or profit from his fraudulently-acquired status,

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[21] The only other case on which petitioner relies is *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C.A. 9), certiorari denied, 346 U.S. 876 (see Pet. Br. 27–29). The case is not in point. A 1934 statute had provided that Filipinos, though "nationals" of the United States, "shall be considered as if they were aliens" for purposes of the laws "relating to the immigration, exclusion, or expulsion of aliens." A 1950 statute (the Internal Security Act) contained a provision directing the deportation of certain "aliens." All the court held (if surprisingly) was that the word "aliens" as used in the later statute was intended to include only real aliens, not "constructive" aliens under the 1934 statute—a holding, in effect, that the later statute impliedly rejected (as of course Congress had the power to do) the application of the earlier one for its own purposes. Even accepting petitioner's misstatement of the case—the case did not hold that the Filipinos were to be considered as aliens only for purposes other than deportation (Pet. Br. 29); they were admittedly subject to all prior deportation laws and the court held only that the specific 1950 statute was not intended to apply to them—we are unable to understand its supposed relevance to this case.

for a time, as a citizen. And it is precisely such a benefit that petitioner claims here.

Had petitioner never been denaturalized, he would admittedly now be deportable under Section 241(a)(4) on the basis of his two convictions for income tax evasion. Nor did his nominal status as a citizen at the time of the acts influence either the performance of the acts or their criminality.[22] Yet despite the irrelevance of the fact of naturalization to the occurrence of the events forming the grounds for deportation, petitioner claims to be immune from deportation because he held a naturalization certificate, albeit fraudulently procured, at the time of his convictions. He claims, in effect, that his fraudulent attempt to obtain citizenship, even though detected, should be made a success at least to the extent of giving him a "citizenship" defense to the consequences of his crimes. It was precisely such attempts to derive a special advantage from one's own fraud, we contend, that the relation-back provision was intended to forestall. If that provision is to be given any effect, the conclusion must be, we submit, that, since the revoca-

[22] The only way in which petitioner even claims that the fact of naturalization might have influenced the events is that he was thereby disabled from seeking a recommendation against deportation from the sentencing court under Section 241(b). But as noted above (pp. 22–25), it was petitioner's own fraud that placed him in that position, and it would surely make the tail wag the dog automatically to give him the benefit of favorable recommendations (by ignoring the convictions) because his previous fraud made it awkward for him to apply.

tion of petitioner's naturalization was "effective as of the original date of" his naturalization, he was not a "citizen" at the time of his conviction for purposes of Section 241(a)(4).[23]

[23] It is appropriate that we allude briefly to the implications the arguments in this case might have upon expatriated, as distinguished from denaturalized, citizens. In the *Eichenlaub* case, this Court expressly left open the question whether the rule announced would be applicable to expatriated persons (338 U.S. at 528–529, n. 14). The question would similarly be left open by the arguments we have made in this case. That is obviously true of the argument based on the relation-back provision of § 340(a) (Point II). To show that it is also true of the argument based on § 241(a)(4) (Point I), we will briefly suggest the nature of the issues on which the deportability of expatriates would turn.

Since only an "alien" can make an "entry" (§ 101(a)(13)), native-born citizens would not be deportable, despite their expatriation, under any of the grounds premised, as most of them are, upon the existence of an "entry." There would be a question, of course, whether pre-expatriation conduct would be grounds for *exclusion* (and subsequent deportability based on excludibility, § 241(a)(1)) if, after expatriation, an expatriate sought to reenter the country, but exclusion and deportation may involve quite different considerations. As to a naturalized citizen who had made an "entry" prior to naturalization, there would be a question whether the "entry," being dependent upon status, would survive his change of status and remain available to serve as a predicate for deportation after he was later expatriated. A still broader question would be whether Congress, in legislating for the deportation of aliens, had in mind the peculiar problems raised by expatriation and would have intended expatriates to be deportable on the basis of their conduct while holding fully-perfected citizenship.

Our purpose is not to express a view as to the merits of those arguments but only to suggest that it is upon broad questions such as those that the deportability of expatriates would turn. Certainly, if there are any reasons why expatriated citizens are not or might not be deportable for pre-expatriation conduct, it is not because § 241(a)(4) uses the word "is" rather than "has been", a ground which, as we have shown, would in any event apply to only one of the many deportation provisions and, even as to that

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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one provision, would exempt only pre-expatriation *convictions* and not, as any rational distinction would suggest, pre-expatriation *conduct*. Concern for the problems presented by expatriation ought not, in short, cause any hesitancy to reject the arguments made by petitioner here.

APPENDIX

Sections 241 and 340 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1251 and 1451, provide in pertinent part as follows:

SEC. 241 (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives

of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

* * * * *

SEC. 340 (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization [1] were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

* * * * *

(f) Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship under the provisions of subsection (a) of this section on the ground that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which he may have, now has, or may hereafter acquire under and by virtue of such naturalization of such parent or spouse, regardless of whether such person is residing within

[1] Subsequent to the events involved in this case, the Act of September 26, 1961, § 18, 75 Stat. 656, inserted the words "were illegally procured or" at the point indicated.

or without the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship. Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization under the provisions of subsections (c) or (d) of this section, or under the provisions of section 329 (c) of this title on any ground other than that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which would have been enjoyed by such person had there not been a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization, unless such person is residing in the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization.

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